

DATE ISSUED: September 7, 2000

REPORT NO. 00-178

ATTENTION: Public Safety and Neighborhood Services Committee  
Agenda of September 13, 2000

SUBJECT: Alcohol Beverage Licenses

### SUMMARY

Issues - 1) Should the City Council delegate the decision making authority for public convenience or necessity determinations for alcohol beverage state license purposes for both off-sale businesses and bars to the San Diego Police Department, 2) Should the City Council approve the use of the outlined criteria in determining public convenience or necessity for off-sale businesses and bars?

Manager's Recommendations - 1) Delegate the decision making authority for public convenience or necessity determinations for alcohol beverage state license purposes for both off-sale businesses and bars to the San Diego Police Department, 2) Approve the use of the outlined criteria in determining public convenience or necessity for off-sale businesses and bars.

Other Recommendations - None.

Fiscal Impact - None. According to Police Department staff, acting as the decision making authority for public convenience or necessity determinations for off-sale businesses and bars is no more labor intensive than the work currently performed by them related to this process, which involves researching the license application after it has been filed through the Department of Alcohol Beverage Control (ABC).

### BACKGROUND

At their meeting of May 31, 2000, the Public Safety & Neighborhood Services (PS&NS) Committee directed the City Manager to analyze the existing alcohol beverage license application process. In addition, the City Manager was directed to analyze data regarding the over-concentration of alcoholic beverage licenses in the Pacific Beach, Mission Beach, Ocean Beach, and Gaslamp areas.

### DISCUSSION

Local government can control retail alcohol businesses by using their zoning authority to regulate such businesses. Under California State law, the Department of Alcoholic Beverage Control may not issue a liquor license if it violates an existing, valid local zoning ordinance. An applicant may obtain a state liquor license only after all zoning permits are issued.

In addition to zoning powers, a local government may exercise some control over an alcohol business by its role in the state licensing decision. Pursuant to Business and Professions Code section 23958, state law mandates that the ABC "shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in, or add to, an undue concentration of licenses". Business and Professions Code section 23958.4 indicates that notwithstanding the initial requirement to reject the liquor license application due to undue concentration, the ABC may issue a license if the "public convenience or necessity" would be served.

Business and Professions Code section 23958.4 does not provide any definition or guidelines for making the public convenience or necessity determination. Instead, the determination of public convenience or necessity and the factors to be considered in making that determination, is left entirely to the local agency.

Nevertheless, courts have provided some guidance in determining the meaning of the words public convenience or necessity. "Public convenience or necessity" has been defined as "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated." Public necessity does not mean indispensable to the public but an urgency less pressing.

The determination of public convenience or necessity is made by either the ABC or the local governing body, depending on the license type. The ABC makes the determination of public convenience or necessity for bona fide eating places (restaurants), hotels, motels, other lodging establishments, and certain other establishments. The local government makes the determination of public convenience or necessity for any other license including off-sale licenses (i.e. liquor, convenience, and grocery stores) and bars. If the local agency makes the determination of public convenience or necessity, the ABC may issue the license despite the undue concentration.

If, however, the local agency finds that the public convenience or necessity would not be served by issuance of the license, that by itself precludes issuance of the license. Therefore, in areas of undue concentration, the local government may prevent issuance of a liquor license for off-sale establishments and bars by making the determination that the public convenience or necessity would not be served by issuance of the license. However, if the local government agency fails to make the public convenience or necessity determination within a 90-day period, the decision making authority is returned to the ABC.

Currently, Planning and Development Review Department staff and Centre City Development Corporation (CCDC) staff are making the public convenience or necessity determination for off-sale businesses for the City of San Diego.

## **City of San Diego Regulations**

### **Off-sale Businesses**

Initially, Municipal Code section 101.0515 provided that the determination of public convenience or necessity would be made by a hearing officer as part of the Conditional Use Permit (CUP) process for all alcoholic beverage outlets which only included off-sale alcohol businesses. Pursuant to Section 101.0515(N)(2)(a) and (b), any alcoholic beverage outlet located within a census tract or within 600 feet of a census tract where the general crime rate exceeded the citywide average general crime rate by more than 20%, or the ratio of alcoholic beverage outlets exceeded the standards set forth in Business and Professions Code section 23958.4, was not permitted by right. Instead, alcoholic beverage outlet applications for those areas could only be approved pursuant to a CUP. The effect of that section was that any time a finding of undue concentration was made by the ABC pursuant to the state guidelines in Business and Professions Code section 23958.4, the Municipal Code required a CUP for that business. Therefore, the determination on the CUP issuance and the state license public convenience or necessity determination was made in one consolidated process.

In order to approve the CUP, a hearing officer would have to make the determination of "public convenience or necessity," in addition to other findings. Prior to the hearing, the Police Department was required to provide the hearing officer with a recommendation on the application with respect to the proposed use and location. The decision of the hearing officer could be appealed to the Board of Zoning Appeals and then to the City Council. For purposes of the state license determination, the public convenience or necessity determination of the hearing officer was indicated on a form provided by the ABC and sent to the ABC. There were no guidelines provided in the ordinance for making the determination of public convenience or necessity.

Currently, Section 141.0502 is the ordinance governing alcoholic beverage outlets. This section also only pertains to off-sale businesses. Section 141.0502, consistent with the previous code sections, provides that all alcoholic beverage outlet applications for areas within a census tract or within 600 feet of a census tract where the general crime rate exceeds the citywide average general crime rate by more than 20%, or the ratio of alcoholic beverage outlets exceeds the standards set forth in Business and Professions Code 23958.4, are not permitted by right and are only allowed pursuant to a CUP. Similar to the previous code section, the CUP is decided after the Police Department provides a recommendation on the proposed use and location of the

alcoholic beverage outlet. Absent from the revised Land Development Code, however, is the delegation of authority to make the public convenience or necessity determination. Yet, based on delegation of authority in the previous Code, Planning and Development Review and CCDC staff continue to make the public convenience or necessity determination for all off-sale businesses for the state license determination and sends that form to the ABC.

### **On-Sale Businesses**

The City of San Diego does not regulate on-sale businesses in the same way as the off-sale establishments. Bars or nightclubs greater than 5,000 square feet are required to get a CUP, and eating and drinking establishments abutting residential zones may be required to get a Neighborhood Use Permit (NUP). Other on-sale businesses are not currently required to get a CUP or NUP.

For the state license determination, Business and Professions Code section 23958.4 provides that the ABC makes the public convenience or necessity determination for most on-sale establishments. However, the local government, or its designated subordinate officer or body, makes the public convenience or necessity determination for bars.

Currently, the authority to make the public convenience or necessity determination for bars has not been formally delegated to any particular agency.

### **Factors in Determining the Public Convenience or Necessity**

In determining what factors to use for making the public convenience or necessity determination, facts relating to aesthetics and the type of business is not beyond the discretionary powers of the decision maker. When making the public convenience or necessity determination, wide latitude is given to the decision maker in choosing the factors to consider. Such inquiries, however, should be limited so as not to discriminate or base decisions on an entirely subjective basis. A decision can be overturned by the courts when it is found to be arbitrary.

### **License Over-Concentration**

As requested, Attachment 1 reflects data regarding the over-concentration of alcoholic beverage licenses in the Pacific Beach, Mission Beach, Ocean Beach, and Gaslamp areas. Also included is data regarding the number of licenses in the La Jolla and Mission Valley areas. Specifically, the attachment identifies actual alcohol licenses and compares them to allowed licenses for both on-sale and off-sale businesses within each area.

## CONCLUSION

The City Council's concerns regarding the proliferation of alcohol businesses in the Pacific Beach, Mission Beach, Ocean Beach, and the Gaslamp areas may be addressed by amending the Municipal Code to provide stricter zoning provisions for these establishments. However, this is not recommended due to the large fees involved and significant length of time it would take for processing these permits and the significant impact on the business community that has not previously been subject to these requirements.

Off-sale businesses are currently regulated by the CUP process. On-sale businesses are not currently regulated and the Land Development Code may not be the most effective tool to do this. Many of the on-sale issues identified by members of the community and the City Council are not directly related to land use regulation. Excessive noise, public drunkenness, vandalism and other undesirable behaviors associated with the consumption of alcohol are addressed by existing regulations outside of the Land Development Code. Adding land use regulations to these existing regulations could be redundant and may not help reduce the identified problems.

The City Council's concerns may be better addressed by utilizing the current state law provisions for local control of alcohol licenses for bars in areas of undue concentration pursuant to Business and Professions Code section 23958.4. The delegation of authority to make the public convenience or necessity determination for both off-sale businesses and bars is entirely within the discretion of the City Council. The City Council has the authority to delegate the decision making authority to any local agency. In addition, the City Council may choose to set forth a policy for determining public convenience or necessity for the agency making that determination by resolution. In doing so, the City Council would be able to better direct the decision maker on how restrictive to be in the approval of licenses in areas of undue concentration. Indeed, the City Council could set a policy that would effectively prohibit most, if not all, alcohol businesses in areas of undue concentration.

It is the recommendation of the City Manager and the City Attorney that the decision making authority for public convenience or necessity determinations for state license purposes for both off-sale businesses and bars be delegated to the San Diego Police Department.

In addition, in order to provide better guidance to the designated agency reviewing these applications it is recommended that the following guidelines be used by the Police Department in determining the public convenience or necessity:

- 1) Whether the issuance involves an existing business with a license which is being transferred to a new location, and which will not result in an increase in the total number of off-sale retail liquor licenses or on-sale retail liquor licenses in the City, or in the census tract in which the business would be located.
- 2) Whether the business, by reason of its location, character, manner or method of operation, merchandise, or potential clientele, will serve a segment of the City's business or residents not presently being served.
- 3) Whether the business will be located within a 600-foot radius of incompatible facilities, such as public and private schools, day care centers, churches, parks,

homeless shelters, and alcohol rehabilitation centers, and facilities designed and operated to serve minors.

- 4) Whether the location of the license will be in a crime data area covered by police department statistics, which has a twenty percent greater number of reported crimes than the average number of reported crimes for all crime data areas in the City, over the previous year. For this purpose, "reported crimes" means reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny theft, and motor vehicle theft, combined with all arrests for other misdemeanor or felony crimes.
- 5) Whether the issuance of the license involves an existing business, which has been located at a site which has had three or more reported crimes as defined in (4) above within the previous one-year period.
- 6) Whether the issuance of the license will promote the goals and policies of the City's General Plan, any applicable specific plan, or any similar policies that have been adopted by the City Council.
- 7) Whether any other information supplied by the applicant, or other competent evidence shows that public convenience or necessity will be served by issuance of the license.
- 8) Whether the applicant has been convicted of any felony.
- 9) Whether the premises are located within 100 feet of residentially zoned property. If a parking lot exists for the benefit of patrons then the 100 feet begins at the perimeter of the parking lot.
- 10) Whether the application is for a premises where a previous license has been revoked within the previous one-year period.

When consideration is given in determining public convenience or necessity, any one of the foregoing guidelines may be sufficient grounds for denial. Each application is judged on an individual basis and any one criteria or combination of criteria may be waived as the result of imposed conditions. An explanation outlining the reasons for denial would be made available to applicants in writing, upon request. A decision denying a determination of public convenience or necessity may be appealed by the applicant to the City Manager, or his designee, and ultimately to the City Council.

The Police Department is willing to act as the decision making authority related to public convenience or necessity determinations for off-sale businesses and bars on behalf of the City of San Diego. Through the Crime Analysis Unit, they have the ability to appropriately research and evaluate the impact of alcohol licenses for off-sale businesses and bars in the City of San Diego. Delegating this authority to the Police Department would streamline the application process for the City and applicants and minimize applicant confusion.

In those cases where a CUP is required for an off-sale license, the Police Department would make

the public convenience or necessity determination prior to an applicant applying for the CUP. The applicant would then be able to use this information to help determine whether or not to apply for the CUP.

In summary, the recommended revisions to this process would enhance the City's ability to evaluate and process alcohol licenses more efficiently and effectively.

#### ALTERNATIVES

Amend the Municipal Code to provide stricter zoning provisions for alcohol businesses.

Have Planning and Development Review and CCDC staff continue to make the public convenience or necessity determination for all off-sale businesses and bars.

Respectfully submitted,

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MCW

Attachment: 1. ABC Licenses

Note: Attachment not available in electronic format. A copy is available for review in the Office of the City Clerk.